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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 477

IN THE MATTER OF THE APPLICATION
OF THE
CITY OF PHILADELPHIA,
against *Petitioner,*
RALPH COHEN,
Respondent.

BRIEF OF THE *RESPONDENT* IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the Full Faith and Credit Clause of the United States Constitution require New York courts to take jurisdiction of an action to collect a tax assessed under a Philadelphia ordinance, especially in view of a New York statute which presently opens New York courts to the enforcement of foreign revenue laws when the foreign taxing jurisdiction affords New York a like comity?

REASONS FOR DENYING THE WRIT

I

New York's statute on the reciprocal enforcement of out-of-state tax claims renders this litigation devoid of special and important reasons for Supreme Court review.

In view of legislation (N. Y. Tax Law §901-903, Appendix A, infra) enacted in New York after the commencement of this action, this litigation presents no "special and important reasons" for review, as required by Supreme Court Rule 19.

The New York legislation provides that the courts of New York shall

> "recognize and enforce liabilities for taxes lawfully imposed by any other State or a political subdivision thereof which extends a like comity to this state * * *." N. Y. Tax Law §902.

The statute deals in a sensible and conclusive manner with the admittedly significant problem posed by *Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935), where this Court said:

> "* * * we will assume that the Courts of one state are not required to entertain a suit to recover taxes levied under the statutes of another * * *." 296 U. S. at page 275.

The statute opens the courts of New York, which the New York Court of Appeals in its decision below held would otherwise be closed, for the collection of revenues due other jurisdictions, on a simple condition. That con-

dition is only that the taxing jurisdiction permit New York or its political subdivisions to enter the courts of that state for the enforcement of revenue laws.

Pennsylvania is not qualified under the condition since, with one exception, it does not permit its sister states to use its courts for the collection of revenues. *Hamilton County Treasurer* (*Ind.*) v. *Hartzell*, 55 Pa. D. & C. 100 (C.P., 1945); *State of Ohio* v. *Flower*, 59 Pa. D. & C. 14 (C.P., 1947); *Ritz Estate*, 8 Pa. D. & C. 2d 115 (C.P., 1956). Pennsylvania does make an exception for sales taxes and use taxes; and, significantly, Pennsylvania opens its courts to the enforcement of sales taxes and use taxes only on the basis of a statute providing for the reciprocal enforcement of those taxes. Selective Sales and Use Tax, Pa. Laws 1228 Sec. 548.2 (1959) (Appendix B, *infra*). Pennsylvania's failure to meet the condition, however, does not enhance the merits of this case for consideration by this Court.

The fact remains that in light of the New York statute no state or any of its political subdivisions is barred from using the courts of New York for the collection of its revenues except by that state's own action or inaction. Therefore, there are absent from this case the significant issues of public importance, transcending the momentary interests of a litigant, which historically justify granting the writ of certiorari. See *Rice* v. *Sioux City Cemetery, et al.*, 349 U. S. 70 (1955). In the *Rice* case this Court dismissed a previously granted writ of certiorari on the ground that an Iowa statute, enacted after the commencement of that action, which by its very terms was inapplicable to the litigants involved in the case, effectively disposed of the claimed denial of constitutional rights for the future.

There is not the slightest suggestion that dealing with the problem of the enforcement of sister-state revenue laws on the reciprocal basis envisaged in the New York statute will not be thoroughly effective. The technique of reciprocity has been tested, and by its repeated use accepted, by the National Conference of Commissioners on Uniform State Laws. It forms the basis of The Uniform Act on Interstate Arbitration of Death Taxes, The Uniform Reciprocal Enforcement of Support Act, The Uniform Reciprocal Transfer Tax Act and The Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings.

In reliance upon, first, the assumption that their courts are not required against their wills to take jurisdiction of foreign tax claims and, secondly, the acceptability of reciprocity as a method for insuring access to the courts in state tax actions, twenty-seven states besides New York have enacted statutes similar to that of New York.[1]

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[1] Alabama Code, Tit. 51, §914 (1958); Alaska Laws 1955, ch. 41, §1, p. 106; Arkansas Acts 1951, No. 73, §2, p. 150; California Revenue and Taxation Code §30; Georgia Code Ann. §92-8448 (1961); Hawaii Rev. Laws (1955) §115-31; Indiana Laws 1951, ch. 180; Kansas Laws 1951, ch. 505, §1; Kentucky R.S. §§135, 190 (1950); Louisiana Acts 1950, No. 19, §1; Maine Laws 1949, ch. 131; Maryland Ann. Code, Art. 81, §127 (1957); Michigan C.L. 1948, 609.13; Minnesota Laws 1949, ch. 145; Mississippi Gen. Laws (1954) ch. 234; New Hampshire Laws 1951, 14:1; North Carolina Session Laws 1939, ch. 158, §938; North Dakota Session Laws 1961 ch. 341 §1; Ohio R. C. §5719.081 (1959); Oklahoma Laws 1939, p. 390 §35; Oregon R. S. 305.610 (1961); South Dakota Session Laws 1953 ch. 478; Tennessee Acts 1949, ch. 157 §1; Virginia Code §58.1021.1 (1959); Washington, R. C. 4.24.140 (1957); West Virginia Code ch. 11, Art. 20 §1 (1961); Wisconsin Laws 1947 ch. 409, statutes 1947 §256.47.

Political subdivisions are expressly included within the statutes of Arkansas, California, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, New Hampshire, Tennessee, Virginia and West Virginia.

See, New York State Department of Taxation and Finance: *Legislative Memorandum*, Reciprocal Enforcement of Tax Liabilities (McKinney's 1962 Session Laws of New York, p. 3572). In addition, three other states, of which Pennsylvania is one, have enacted reciprocity statutes relating to particular tax enactments:[2]

This clearly demonstrates the episodic nature of this litigation and that it is well within the competence of the states themselves, generally, and Pennsylvania, in particular, to deal effectively with the problem Pennsylvania has foisted upon itself. Indeed, in view of Pennsylvania's recognition of the reciprocity technique and its choice to limit the jurisdiction of its courts in dealing with foreign revenue laws to the reciprocal enforcement of sales and use taxes only, New York is simply being asked, for the sake of this unique litigation, to be "more Roman than the Romans". See, *Hughes* v. *Fetter*, 341 U. S. 609, 621 (1951) (Frankfurter, J. dissenting opinion).

II

The judgment below rests on adequate state grounds. New York properly held it need not apply the Full Faith and Credit Clause of the United States Constitution to either the Philadelphia ordinance or the Philadelphia assessment.

(a)

In balancing the interests of two states to determine if the Full Faith and Credit Clause must be applied, this Court has at no time enforced a state of vassalage upon a forum where the forum's policy is in conflict with the

[2] Pennsylvania, *supra* (sales and use taxes); Texas RCS ch. 20 Tit. 122 A, Artc. 20.17 (1961) (sales and use taxes); New Jersey Laws of 1962, ch. 70 (income taxes).

statutes of another jurisdiction dealing with that jurisdiction's sovereign powers. On the contrary, this Court has recognized a policy of non-interference when the sovereign functions of one state are called upon for enforcement in another. Thus at one time it was held that a state might not even be called upon to enforce a judgment for taxes obtained in another state. *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (1888). The Supreme Court there pointed out that

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue * * *" 127 U. S. at p. 290.

The distinction between the statutes of a state dealing with its sovereign functions and its statutes dealing essentially with the rights of private individuals explains this Court's holding in *Huntington* v. *Attrill*, 146 U. S. 657 (1892). This Court there held that a New York law imposing personal liability on corporate officers for debts of the corporation could be enforced in the courts of Maryland, against the defendant's claim that the statute was penal in nature. The Court stated:

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. * * *" 146 U. S. at p. 668.
>
> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State,

> or to afford a private remedy to a person injured by the wrongful act. * * *" 146 U. S. at pp. 673-674.

This distinction for purposes of the Full Faith and Credit Clause between a foreign state's statutes dealing with essentially private rights and liabilities and a foreign state's statutes relating to the state's sovereign powers makes inapposite *Converse* v. *Hamilton*, 224 U. S. 243 (1912); *Broderick* v. *Rosner*, 294 U. S. 629 (1935); *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145 (1932); *Hughes* v. *Fetter, supra;* and *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430 (1943) cited by Appellant and *Amici Curiae*. *Broderick* v. *Rosner* and *Converse* v. *Hamilton* involved liabilities of a commercial nature sought to be enforced for the benefit of private individuals, namely, individual creditors. *Bradford Electric Co.* v. *Clapper*, *Hughes* v. *Fetter* and *Magnolia Petroleum Co.* v. *Hunt*, involved recoveries sought under workmen's compensation statutes which, similarly, are essentially private in nature.

Respondent by no means claims that the holdings in those cases were erroneous; that no statutes of one state are entitled to full faith and credit in another. He does maintain that statutes relating to a state's sovereign functions do not invoke the operation of the Full Faith and Credit Clause and that the Full Faith and Credit Clause should not be used to force a change in well-established conflict of laws rules. See, *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 518 (1953); Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 Colum. L. Rev. 969, 1014 (1956).

(b)

Judge Learned Hand in *Moore* v. *Mitchell*, 300 F. 2d. 600 (2d Cir. 1929), *affirmed on another ground*, 281 U. S. 18 (1930), explained the wisdom in not requiring the

courts of one state to sit in judgment on the revenue laws of another state against its will, as follows:

> "To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper". 30 F. 2d. at p. 604.

The good sense in adhering to this policy is amply demonstrated in this case. Here scrutiny must be made of the Pennsylvania revenue laws and the relations between Pennsylvania and its citizens. For example, notwithstanding the assumption by the New York Court of Appeals in its decision below that Respondent's liability for the Philadelphia tax is "perfect and complete", the courts of New York would necessarily have to decide the issue of the perfection and completeness of that liability, if any, in the event they were forced to take jurisdiction of this case.

Philadelphia v. *Sam Bobman Dept. Store Co.*, 189 Pa. Sup. 72 (Super. Ct., 1959) is not dispositive of those issues since that case merely held that the *amount* of the taxpayer's liability was not open to further question in the courts of Pennsylvania in view of the taxpayer's failure to appeal the assessment made against him to the Philadelphia Tax Review Board. There remains unanswered the precise limits of the *res judicata*, or estoppel, effect of a taxpayer's failure to petition the Philadelphia Tax

Review Board for a review of an assessment made against him, and, of course, full faith and credit need, in any event, be given only to the extent that a judgment is *res judicata*. *Lynde* v. *Lynde*, 181 U. S. 183 (1901).

Indeed, it appears probable that despite the asserted finality of the Philadelphia assessment, the issue of Respondent's liability for the tax would not be *res judicata* in the Pennsylvania courts. The present Solicitor of Philadelphia has stated that the Tax Review Board could not bind the Philadelphia Department of Collection (Shmukler, *Philadelphia Tax Review Board: An Experiment in Municipal Administrative Law*, 109 U. Pa. L. Rev. 670, 688 & n. 83 (1961)); and in the absence of mutuality in the binding effect of a prior determination, Pennsylvania has held that *res judicata* will not be granted to the determination. *Chandler's Appeal*, 100 Pa. 262 (1882); *Public Service Taxi Co.* v. *Carter*, 54 Lack. Jr., 177 (C.P., 1953). The very possibility that a New York Court might conclude in this regard otherwise than Pennsylvania, emphasizes the earnest obedience to be given Judge Hand's dictum to avoid committing a state to a decision which could seriously embarrass its neighbor.

Judge Wyzanski's decision in *City of New York* v. *Shapiro*, 129 F. Supp. 143 (D. Mass. 1954) is not contrary. In that case the New York tax enactments gave the New York administrative determination the status of an independent obligation. New York City Administrative Code, Ch. 46, Tit. B, §B46-10.0 provided New York City with the power to proceed upon an unpaid assessment "with like effect as that provided by law in respect to executions against property upon judgments of a court of record".

Here, to the contrary, the Philadelphia statute does not provide for the enforcement of the tax assessment, but requires that an independent action, looking to a final

judgment, be brought with respect to the assessment. In other words, an assessment which requires for its enforcement a conclusive judgment can not itself be a conclusive judgment. Hence, the considerations of the *Milwaukee County* case, *supra*, are not present. There, the Court based its holding that full faith and credit must be given to a judgment for taxes on the grounds that:

> "In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. * * *" 296 U. S. at p. 275.

A comparison of *Magnolia Petroleum Co.* v. *Hunt*, *supra*, with *Carroll* v. *Lanza*, 349 U. S. 408 (1955) points up the significance of the absence of a final adjudication when one is envisioned in the state's procedure. In the *Carroll* case this Court held that the Full Faith and Credit Clause does not preclude the state in which an injury occurred from awarding the injured employee damages in a common law action despite the fact that he was receiving payments under the law of the state where his employment contract was made and whose statutes provided that the rights and remedies granted by it shall exclude all other rights and remedies at common law or otherwise. This Court said:

> "There (Magnolia *v.* Hunt) the employee having received a *final award* for compensation in the forum of the injury returned to his home state and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause. But here there was no final award under the Missouri Act. Under that Act the statutory payments apparently start auto-

matically on receipt of notice of the injury. . . . While provision is made for an adjudication of disputes between an employee and his employer no adjudication was sought or obtained here." 349 U. S. at pp. 410-411.

(c)

There is little that could more disparage the "strong unifying principle embodied in the Full Faith and Credit Clause" (*Hughes* v. *Fetter, supra*, at p. 612) than extending its applicability to municipal ordinances. One can imagine what disruptive fragmentation could result from forcing upon the fifty states, against their wills, the policies of the country's thousands of municipalities.

No case has required one state to give full faith and credit to the municipal ordinances of another state. Indeed, the plain language of 28 U.S.C. 1738, which implements the Full Faith and Credit Clause, provides that the acts to which full faith and credit are to be given are "The Acts of the legislature of any State, Territory or Possession . . ." 28 U.S.C. 1738. (Appendix C, infra).

The holdings of this Court that municipal ordinances constitute state action under the 14th Amendment, the Contract Clause of the United States Constitution and 28 U.S.C. §1257 rest on entirely different considerations from those involved in the Full Faith and Credit Clause. Clearly, constitutional rights are not to be denied, whether by municipal action or by state action, but municipal ordinances cannot be equated with statutes for all purposes. See, Brandeis, J., dissenting opinion, in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 115 (1928).

A municipal ordinance which conflicts with the statutes or public policy of the state of which the municipality is a part would be invalid. 5 McQuillan, Municipal Cor-

porations, 100 §15.21 (3rd ed. 1949). Thus an ordinance should not prevail over the policy of another state.

(d)

The question whether New York should permit the Philadelphia action to be maintained in its courts rests exclusively on the principle of comity, which is a question exclusively for the courts of New York to decide. *Finney v. Guy*, 189 U. S. 335 (1903); See, *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373 (1903), applying the doctrine of forum non conveniens.

Leflar in *Extra State Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932) points out that arguments for the enforcement of foreign revenue laws which may be applicable elsewhere do not apply with equal force in New York.

> "Occasional statements implying that a state allowing foreign tax collecting suits would soon find itself in the role of full-time tax collector for its neighbors contain an element of truth with respect to one state at least. That state is New York. Practically every judicial report of attempted extra-territorial collection of taxes in the United States has come from the state and Federal Courts of New York. This fact emphasizes the seriousness of the problem of tax evasion by the removal of property across a state boundary, as well as the inconvenience to New York courts of entertaining foreign tax suits. New York is a natural place to which to send securities and valuable property generally, whether innocently, or for the express purpose of tax evasion. The burden on New York courts and the New York taxpayers paying for the Courts would become considerable if tax collecting suits by other states were freely allowed there." 46 Harv. L. Rev. at pp. 218-219.

These considerations necessitate leaving to the states themselves the determination of to what extent and under what circumstances their courts will be open to foreign tax claims.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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October 29, 1962

APPENDIX A

NEW YORK TAX LAW

ARTICLE 25

RECIPROCAL ENFORCEMENT OF TAX LIABILITIES

§ 901. Collection of taxes by suits in other states

At the request of the tax commission the attorney-general may bring suit, in the name of this state, in the appropriate court of any other state to collect any tax legally due this state, and any political subdivision of this state or the appropriate officer thereof, acting in its behalf, may bring suit in the appropriate court of any other state to collect any tax legally due to such political subdivision.

§ 902. Enforcement of taxes imposed by other states

The courts of this state shall recognize and enforce liabilities for taxes lawfully imposed by any other state, or any political subdivision thereof, which extends a like comity to this state, and the duly authorized officer of any such state or a political subdivision thereof may sue for the collection of such a tax in the courts of this state. A certificate by the secretary of state of such other state that an officer suing for the collection of such a tax is duly authorized to collect the same shall be conclusive proof of such authority.

§ 903. Interest and penalties

For the purposes of this article, the words "tax" and "taxes" shall include interest and penalties due under any

taxing statute, and liability for such interest or penalties or both, due under a taxing statute of another state or a political subdivision thereof, shall be recognized and enforced by the courts of this state to the same extent that the laws of such other state permit the enforcement, in its courts of liability for such interest or penalties or both, due under a taxing statute of this state or a political subdivision thereof.

APPENDIX B

Selective Sales and Use Tax
Sec. 5482, Pa. Laws 1228 (1959)

The courts of this Commonwealth shall recognize and enforce liabilities for sales and use taxes lawfully imposed by any other state, provided that such other state extends a like comity to this Commonwealth.

APPENDIX C

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if the seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in very court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.